SFB 700 GOVERNANCE IN AREAS OF LIMITED STATEHOOD

Non-State Justice Institutions

A Matter of Fact and a Matter of Legislation

Matthias Kötter

SFB-Governance Working Paper Series • No. 34 • June 2012

DFG Sonderforschungsbereich 700 Governance in Räumen begrenzter Staatlichkeit - Neue Formen des Regierens?
DFG Collaborative Research Center (SFB) 700 Governance in Areas of Limited Statehood - New Modes of Governance?

SFB-Governance Working Paper Series

Edited by the Collaborative Research Center (SFB) 700 "Governance In Areas of Limited Statehood - New Modes of Governance?"

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Kötter, Matthias 2012: Non-State Justice Institutions: A Matter of Fact and a Matter of Legislation, SFB-Governance Working Paper Series, No. 43, Collaborative Research Center (SFB) 700, Berlin, June 2012.
ISSN 1864-1024 (Internet)
ISSN 1863-6896 (Print)

This publication has been funded by the German Research Foundation (DFG).

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Deutsche
Forschungsgemeinschaft
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Non-State Justice Institutions: A Matter of Fact and a Matter of Legislation

Matthias Kötter

Abstract

This paper focuses on the function and the significance of non-state justice institutions, a phenomenon that has received a great deal of attention in jurisprudence lately. The question of their official recognition by state law is a major issue in the discourses of comparative constitutional law and law & development. This paper discusses the benefits and flaws of non-state justice institutions with respect to the rule of law. It focuses on various forms of state regulation of non-state justice institutions, and analyses how such regulations are formed in different countries and which regulatory motives they are based on. Different legislative models that serve to provide the connection between the non-state justice institutions and the state legal system and judiciary can be distinguished. The conceptual considerations in this paper are complemented by brief study reports of eight cases of non-state institutions from seven different countries. The paper reveals that non-state justice institutions are not a phenomenon in weak states only, but exist under various conditions of weak and strong statehood. The form of their incorporation and regulation depends on the condition of the over-all legal order.

Zusammenfassung

Nichtstaatliche Gerichte und ihre Anerkennung im staatlichen Recht haben seit einigen Jahren Konjunktur als Thema internationaler Diskurse an der Schnittstelle von Verfassungsrecht und dem Recht in der Entwicklungszusammenarbeit. Die Arbeiten zeigen, dass nichtstaatliche Gerichte wichtige rechtstaatliche Funktionen erfüllen, diese gleichwohl aber auch erheblich stören können. Diese Ambivalenz von nichtstaatlichen Gerichten steht im Zentrum dieses Beitrags, der im Hinblick auf verschiedene Arten nichtstaatlicher Gerichte nach den Voraussetzungen ihrer Anerkennungsfähigkeit und nach der gesetzlichen Ausgestaltung der Anerkennungsregelungen fragt. Den Erörterungen liegen acht Fälle aus sieben verschiedenen Ländern zugrunde, die näher geschildert werden. Der Beitrag zeigt, dass nichtstaatliche Gerichte keinesfalls nur in schwachen Staaten vorkommen. Die jeweilige Stärke des Staates ist aber nicht ohne Auswirkung auf den Grund, aus dem die gesetzliche Anerkennung eines nichtstaatlichen Gerichts erfolgt, und sie muss auch bei der Ausgestaltung des Anerkennungsgesetzes beachtet werden, um ein reibungsloses Zusammenspiel von nichtstaatlichem und staatlichem Rechtssystem zu gewährleisten.

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1. Introduction[1]

Non-state justice institutions have a great deal of attention in jurisprudence lately. Their functions and their recognition by official state law are a major issue in the discourses of comparative constitutional law and law & development discourse. This paper focuses on the benefits and flaws of non-state justice institutions with respect to the rule of law.[2]It focuses on various forms of state regulation of non-state justice institutions, and analyses how such regulations are formed in different countries and which regulatory motives drive them. Different legislative models which connect non-state justice institutions and the state judiciary can be distinguished. The conceptual considerations in this paper are complemented by brief case studies of eight of non-state institutions from seven different countries. The paper reveals that non-state justice institutions are not a phenomenon that occurs in weak states only, but exist under various conditions of weak and strong statehood. The form of their incorporation and regulation depends on the condition of the over-all order.

I will focus on four aspects. First, I will take up the conceptional considerations on the connection of non-state justice institutions and the rule of law, and distinguish between the rule of law functions provided by non-state justice institutions and their flaws. Second, I will show that non-state justice institutions are not a phenomenon of weak or fragile statehood i.e. in the sense of law enforcement ability. Third, with respect to regulation of non-state justice institutions I will distinguish different legislative models which connect non-state justice institutions, and the state legal system and judiciary. I will then elaborate on different states' regulatory motives. We will see that the degree of statehood relates to the regulatory motive rather than the type of regulation. Fourth, I will examine elements of regulations of non-state justice institutions and distinguish different formulations of substantial prescriptions and rules for the institutional incorporation of non-state justice institutions into the general institutional setting. I will conclude with some remarks on the function and capacity of non-state justice institutions from a constitutional jurisprudence point of view.

2. Non-state justice institutions and the rule of law

The notion of non-state justice institutions encompasses a variety of phenomena in different societies with various functions. It describes various arbitration or decision-making forums that serve to resolve disputes or to achieve a collective decision, and that relate to a social practice distinct from official state policy (Connolly 2005: 242; Forsyth 2007: 67). In this paper, the notion of non-state justice institutions is inclusively used for a multitude of arrangements that serve a wide spectrum of justice functions from arbitration to court-like decision-making. They

1 An earlier version of this paper was presented at the ISA International Social Studies Association 53rd Annual Convention 2012 in San Diego. I would like to thank the discussants at this meeting and especially Jennfer Keister (Harvard Kennedy School) for valuable comments and critique.

2 For different approaches see Levy 2000; Chirayath et al. 2005: 3; Connolly 2005; Van Cott 2006; Stephens 2009; Bekker/Rautenbach 2010; Tamanaha 2011, 2013; World Justice Project 2011.

may be formed by traditional or religious authorities such as elders or other respected community members, for example in the customary courts of many African countries like South Africa (Case 1) or South Sudan (Case 6).

Case 1 – Customary courts in South Africa. Customary courts in South Africa have a long tradition. They have an eminent social and political function even today, and the constitution of 1996 even gives them official status. If a member of an African community in South Africa wants a court decision regarding a family issue he or she can choose: she can either bring the suit to a magistrates' court and have formal judges decide or she can address the chief of the community or one of his henchmen as the head of the local customary court. Either way, the South African constitution in Sec. 211 provides that the court must judge the case according to the applicable customary laws. The judges of the magistrates' court, who may not know the specifics of local custom, will call in expert witnesses to lay out the legal situation (Rautenbach 2013). The courts are obliged to apply customary law subject to the constitution and other applicable state laws. However the customary courts do not reflect provisions by the constitution or state court precedents in their decisions. To counteract this, the litigants have the right to appeal the finding of the traditional court to a magistrate's court and further on to a high court and finally to the Supreme Court of Appeal, or, in the case of a constitutional issue, to the Constitutional Court.

Non-state justice institutions may also rely on religious authority like the Sharia courts active in several countries in South and East Asia and Africa, e.g. the federal and state Sharia courts in Ethiopia (Case 2).

Case 2 – Federal Sharia Courts in Ethiopia. The federal Sharia courts in Ethiopia can be addressed by anyone in the case of a personal or family matter relating to Islam. For example, the courts can be addressed for a divorce provided the petition relates to a marriage concluded, or that the parties have consented to be adjudicated in accordance with Islamic law. They can also be addressed with a question regarding the succession of wills provided the deceased was a Muslim at the time of his death (Girmachew 2013). The mandate of the Sharia court to give a decision requires the litigants' consent; if consensus cannot be reached a state court must adjudicate the case. For their decisions, the Sharia courts apply Islamic law, but they are bound to apply the official Civil Procedure Code and other relevant statutory procedural rules, which implies that state institutions exercise the enforcement of the Sharia court's decisions. Even the court organisation and stages of appeal are prescribed by federal and state legislation. After a case is brought before a Sharia court and consented to by the litigants, however, it cannot under any circumstance be transferred back to the state judiciary. The Sharia court's jurisdiction is, in this case, exclusive and final.

Non-state justice institutions are "non-state" in the sense that they relate to a non-state normative mechanism. The variation of different manifestations is wide. In the majority of cases, non-state justice institutions are part of the historically passed institutional canon. They may have survived within the official governmental setting, because (1) they may deal with subjects of no general interest; historically, self-governance often results from regulatory indifference of the official government, or (2) the state may be too weak to suppress them, or (3) they may even be acknowledged by the state and integrated into state governance. Non-state justice institutions may also be newly created "traditional-style" state organs who relate to tradition for the reason

of legitimacy (Penal Reform 2000: 11; Connolly 2005: 242). Non-state justice institutions can be obliged to adhere to the state law and they can even be formally incorporated into the state court system, as in the case of the Ethiopian kebele social courts[3] which are formal state organs that provide court-like decisions by applying shimglina, a traditional mechanism of arbitration. But even if the law formally recognises and incorporates them, these institutions stand out from the official state institutions and are regarded as "non-state" by the people.[4]

Case 3 – Kebele social courts in Ethiopia. Kebele social courts in Ethiopia are court-like bodies within the local kebele administration that have jurisdiction to try cases of small claims and petty offences. They apply the traditional shimglina mechanism of deliberative conflict-resolution which was formerly exercised by respected elders. But they also relate to the tradition of the local judge Abbat, a respected elder who was accepted by popular consensus and who served as the arbiter of public affairs. Officially formalised in the time of the Derg regime in the 1980s, today the social courts are regulated by state law. Respective proclamations decreed by the regional governments and providing rules for the composition, procedure, and remedy exist in most of the Ethiopian regional states. According to some, the judges have to be elected by the community members, or, sometimes, by the kebele council. The courts are free to apply local customary law to reach a decision but they can also rely on state law. In the capital of Addis Ababa, the presiding judge of the Social Court does not have to hold a law degree, but "shall at least be graduate of law in certificate and have relevant work experience".

Being part of the kebele administration, the social courts are not formally incorporated into the judiciary but are part of the executive branch (Prigge 2012: 9). However, the states provide rules for appeal to the general courts.

Even though non-state justice institutions rely on tradition in their arbitration, they are far from nostalgic. Rather, the existing bodies can be powerful contemporary institutions that deal with everyday problems (Tamanaha 2013) – and they always have been. The interest socio-legal sciences have in non-state justice institutions is also far from new. Early legal anthropological research on customs and traditional laws in colonial Africa from the 1950s already focused on the proceedings and decisions of traditional judges and courts in order to describe unique cultural phenomena (Glucksman 1955). This method still prevails in the empirical research on legal pluralism today (Moore 2001: 98; von Benda-Beckmann 2002: 37). Early works revealed how popular and well established the traditional courts were under colonial rule; they were sometimes even sanctioned by the colonial rulers and used for indirect rule (Tamanaha 2013). It is only recently, however, that the literature on law and development has turned to non-state justice institutions as a present form of conflict-resolution and governance. This reflects non-state institutions as part of the state governance system and is taking place not only in respect to

3 Kebele (meaning "neighborhood") is the lowest level of administration in Ethiopia. In the Tigray Region, the expression kebele is only used for rural areas whereas the equivalent in urban areas is tabia (Assefa Fiseha 2011).

4 Lee Van Cott (2006: 267) speaks of "informal justice institutions," but points out that from the perspective of indigenous peoples, "indigenous law is formal law – binding, authoritative, and deeply rooted in indigenous norms and cultures." However, as the term "indigenous law" would be used to express and affirm indigenous peoples' rights to self-determination she prefers to describe it "from the indigenous point of view as a 'counter-formal' institution".

cases in Africa, but also to those in Latin America and South Asia. The interest in the Pakthun jirga, who play an important role in Afghanistan and Pakistan, is an example of this trend.[5]

Case 4 – Pakthun *jirgas* in the Pakistani FATA. In large parts of the Federally Administered Tribal Areas (FATA) in the north of Pakistan, no state courts exist. Even though, according to the constitution, a governor federally administers these areas, in reality they are self-regulated and self-governed by the local communities. If a member of a local community wants a third party decision on a family issue, he or she has to address one of the local leaders of their sub-tribe to call a jirga. Jirga describes a traditional Pakthun gathering of community elders, the word supposedly derives from an old Arabic expression meaning "circle" (Lentz 2000: 224). As a forum for local decision-making and conflict-resolution the jirga deals with all kinds of issues including conflicts about land and property, inheritance, acts of violence, and even homicide, as well as all other intratribal disputes. The jirga also serves as a link between the communities and the federal administration. The composition, membership, and rules of procedure depend on local tradition. The size and structure depend on the nature and gravity of the issue at hand (Connolly 2005: 263). The jirga's objective is to re-establish peace within the community. In their deliberations and decisions, the members of the jirga will draw on Pakthun customary law (Pakthunwali), local custom (riwaj), and Sharia law. No Pakistan statutory law will be applied. Litigants have no right to appeal to a state court. According to the federal Frontier Crimes Regulation FCR passed in 1901, jirgas are not recognised as courts but rather as advisory bodies on the level of the local administration.

In order to explain the popularity and functionality of non-state justice institutions the literature unanimously points to the practical needs of the rural populations. Relevant parts of the population, especially from rural villages, prefer the traditional structures and do not take cases to the state courts. These people have much better access to the non-state courts: the procedure takes place on site, is more or less free of cost, and the hearings are part of an informal procedure. The courts are run by local people and in a language everyone speaks. And the decisions are made according to laws everyone has been brought up, and lives in accordance, with. Non-state procedure typically aims to restore the social harmony that was unbalanced by the conflict, and not to enforce an abstract rule of law (Access Report 2000: 9; Connolly 2005: 241). The proceedings are not rule-oriented, but justice-oriented in the sense that they are in accordance with the local normative consensus. Non-state justice institutions allow for a better "access to justice" in the sense of language and knowledge of the applicable law – one major benefit in respect to the rule of law. Furthermore, due to poor state capacity and a lack of justice infrastructure, non-state justice is often the only form of justice available to many people. In South Africa in 2000, for example, an extra 3,000 courts would have been needed in order to provide access to the state judiciary on an adequate basis compared to customary courts – a number unrealistic under the current conditions (Penal Reform International 2000: 7).

5 Connolly (2005: 263) describes the Bangladesh variant Shalish.

However, the reasons for the large amount of attention non-state justice institutions have received in the field of law and development lately go beyond practical convenience. Two parallel developments have to be considered:

First, a perception has grown that the transfer of western-style judiciaries to post-conflict societies has more or less failed (Carothers 2006: 11). After two decades of spending billions of dollars on institution-building and promoting the rule of law, the outcome still seems meagre. Recent studies have shown that in many cases, the new courts and the laws they apply are not met with the necessary acceptance – especially in rural areas where tight traditional communities prevail (Tamanaha 2013. The relevant literature repeatedly mentions the figure of 80% of cases still being dealt with by non-state justice institutions (Chirayath 2005: 3; Connolly 2005: 241; Tamanaha 2013). Even if this number does not rely on empirical evidence and seems to be rather an estimation and even somewhat exaggerated, it does express the general perception that instead of being brought to the newly established state courts, conflicts are still first and foremost dealt with inofficially. Rather than to provide justice to the rural populations of developing countries, the promotion of the rule of law has exposed seemingly unresolvable gaps between the justice systems (Schuppert 2009: 211).

Second, in response to this "unresolvable gap," recent law and development efforts have focused on the strengthening of existing traditional justice institutions accompanied by a conceptual concession. More and more, critics of non-state institutions seem willing to broaden their singularly state-centred understanding of the rule of law and acknowledge functional equivalences provided by non-state justice institutions. The rule of law is no longer seen as an exclusive provision of the modern western style constitutional state. Rather, it is functionally understood as a bundle of principles which provide normative requirements for the wielding of governance power, especially legal bindings and the control by an independent judiciary. In this sense, Tamanaha (2013) has stated that "although non-state justice systems do not meet the requirements of the rule of law, they can and do satisfy rule of law functions," at least in the sense that they can "play an important role in connection with establishing and maintaining rule governed behaviour between citizens". They complement – and sometimes even substitute – the general infrastructure for conflict-resolution, may allow for the restoration of the social peace, and can even provide legal certainty.

This conceptual concession is reflected in the World Justice Project's Rule Of Law Index – a recent approach to measuring the rule of law that until recently only focused on state structures. The authors however announced that starting from 2012, the index will include "informal systems of law" as one of its key factors that "concerns the role played in many countries by 'informal' systems of law – including traditional, tribal, and religious courts, as well as community based systems – in resolving disputes." (World Justice Project 2011: 13/14) Until now, respective data "could not have been accounted for … because of the complexities of these systems and the difficulties of measuring their fairness and effectiveness in a manner that is both systematic and comparable across countries." (ibid.) The authors clearly relate non-state justice institutions to the conditions of weak statehood in pointing out that "these systems often play a large role in

cultures in which formal legal institutions fail to provide effective remedies for large segments of the population." (ibid.) Yet, non-state justice institutions also exist under conditions of strong statehood, as will be discussed in this paper, although they have a slightly different function.

An important part of recognising the benefits of non-state justice institutions, is also being prepared to accept their flaws (Tamanaha 2013): (1) Non-state justice institutions usually function properly within a homogenous community where people were brought up with and internalised applicable norms. However, they may not function correctly in heterogeneous groups. Problems arise whenever a "third person" i.e. a non-member is involved in the conflict.[6] (2) Non-state justice institutions can effectively regulate social conflicts on the community level and they even provide rules for conflict resolution between various communities. However, they are not designed for resolving conflicts between the people and official state institutions. (3) Non-state institutions may reach the limits of their potential to pacify and reintegrate, when the harmony within a community is deeply disturbed. Serious crimes like murder could lead to such disturbances, and in various cases capital crime is excluded from the non-state justice institutions' jurisdiction. On the other hand, particularly serious crimes should possibly be tried and sentenced by a traditional court whose fundamental legitimacy allows it to restore social peace. For minor offenses the state judiciary may seem "good enough". (4) The most frequently mentioned objection concerns human rights. To ensure a decent standard of human rights protection and a fair trial in traditional procedures some kind of monitoring of, and interference in, non-state institutions may be required. According to this view, even though non-state institutions are supposed to provide a better "access to justice", in many cases they only provide "poor justice for the poor" (Stephens 2009: 151).

This last point raises the issue of greater regulation of non-state justice institutions. State law may provide an adequate framework to embed the non-state institution into a formal legal regime aiming at guaranteeing the adherence to national and international human rights standards and due process. As a subject of state legislation, the non-state system can be recognised and confirmed by state law and even be incorporated into the system of state institutions (Hinz 2008: 62). Various legal systems prefer different types of regulations. Thus non-state justice institutions are granted autonomy, but are bound to the state justice system to varying degrees. The respective regulation can serve as a normative bridge between state law and the non-state legal system, thus avoiding normative collisions.

3. Non-state justice institutions and different degrees of statehood

Non-state justice institutions and their benefits are commonly associated with states "where the formal justice system is weak" (Connolly 2005: 243), or – as the 2010 Rule of Law Index puts it – these institutions "often play a large role in cultures in which formal legal institutions fail to

6 For the restriction of the jurisdiction of Customary Courts to conflicts among „the indigenous African peoples of South Africa" see Bekker/Rautenbach (2010: 17/21), and for the difficult handling of third person cases in US American Indian Law see Canby (2009: 148/168).

provide effective remedies for large segments of the population" (World Justice Project 2011: 13/14). However, non-state justice institutions are not a phenomenon to be found only in conditions of weak statehood. They certainly play a more prominent role in weak or fragile countries with no effective state justice institutions, which they aid and compete with. For example in heterogeneous countries like South Africa which in large parts has a well-functioning judicial system, but where customary courts hold an exclusive position in rural areas. Examples of formally recognised non-state justice institutions can be found in the global North as well, for instance the self-regulation autonomy of religious communities in Germany (Case 5), or the jurisdiction of the Native American tribal courts in the United States (Case 7).

Case 5 – Constitutional Recognition of Religious Law in Germany. The German Grundgesetz grants substantial autonomy to religious communities to regulate and administer their own internal affairs subject to the "generally binding laws", and they may also facilitate their own arbitration and decision-making forums. It does not infringe on European or constitutional provisions on equality and anti-discrimination when religious communities regulate their own affairs and e.g. tie certain rights to the status of membership. The religious communities' special jurisdiction means that reference to a state court is barred and may only occur after religious remedies have been exhausted (see Federal Supreme Court (BGH), 28.3.2003; Federal Constitutional Court, 9.12.2008). Whenever the special jurisdiction of religious courts does not apply, the case may be taken to a state court, even in cases concerning the internal affairs of a religious community. The state courts have to consider the applicable laws of the religious community. However, religious communities can also use state law when regulating their own affairs, as usually occurs in cases of labour contracts. In this case, the German labour courts apply labour law, however modified to suit specific religious regulations and always within the scope of constitutional freedom of religion. Both strands of legal process – the church and the state courts – lead to the German Constitutional Court as a last resort (Federal Constitutional Court, 4.6.1985).

The German religious communities' right to regulate their internal affairs and facilitate their own conflict resolution forums resembles the South African traditional communities' right to self-governance and customary courts. In both cases, the normative system relates to members of a specific group within the population. Their autonomous courts can make binding decisions; however, they are subject to basic constitutional regulations. In both cases, under certain circumstances, the members have the right to take legal action or to appeal to the state judiciary, which to a certain degree has to apply the traditional law to make its decision. While the application of South African Customary Law depends on cultural and ethnic affiliation and affects mainly issues of family and communal life, German religious law applies specifically within the organisational sphere of religious communities and their members. Main areas of its application concern questions of status, labour laws, and school laws.

Table 1 shows eight examples of non-state justice institutions from seven countries. The countries differ in terms of the strength of statehood, understood as the ability to enforce the law, other government regulations, and to hold a monopoly on the use of force. The three different indices use slightly different indicators, but together they allow countries to be positioned on a scale from "weak" to "strong" in terms of statehood. The leading indicator is "Stateness" from

the Bertelsmann Transformation Index (BTI); the figures from the Rule of Law Index, and from an index developed by the Berlin Research Group on Governance in Areas of Limited Statehood (Lee et al. 2012) support the sequence. The table shows that non-state institutions can be found in conditions of particular weak statehood, like in Sudan, as well as under the condition of strong statehood, like in Germany or the USA. This suggests that there is in fact no relation between their occurrence and state performance.

Table 1: State strength based on a monopoly on the use of force

State strength	Weak <<					>> Strong	
Country	Sudan	Pakistani FATA[a]	Ethiopia	Bolivia	South Africa	USA	Germany
Non-State Justice Institution	Customary Courts	*jirga*	Social Courts, Sharia Courts	Customary Courts	Customary Courts	Indian Courts	Religious Law
BTI[b]	3.5 (4/1)	4.5 (4/2)	5.8 (5/2)	7.8 (6/7)	8 (7/8)	--	--
ROL[c]	--	0.29	0.44	0.38	0.6	0.65	0.68
SFB700[d]	1.0/0.41	2.0/0.75	1.5/0.58	2.0/0	2.0/0	4.0/0	4.0/0

[a] The values for Pakistan relate to the whole of the country, not only the tribal areas FATA; specific data for the FATA does not exist, but it may be assumed that the state strength velue would be even lower.

[b] Bertelsmann Transformation Index 2010: "Stateness" (collective item) ("Monopoly on the use of force"/"Effective power to govern") (Top performers: 10); http://www.bertelsmann-transformation-index.de/fileadmin/pdf/Anlagen_BTI_2010/BTI_2010_Codebuch.pdf; http://www.bertelsmann-transformati on-index.de/fileadmin/pdf/Anlagen_BTI_2010/Detaillierte_Werte_BTI_2010.xls.

[c] Rule of Law Index 2011: 6.1: "Government regulations are effectively enforced" (Top performer: Sweden 0.84); http:/worldjusticeproject.org/rule-of-law-index-data.

[d] SFB 700 Index: "Rule implementation"/"Monopoly of force" (0= unthreatened, 2= highly threatened).

The weak statehood performers on the left hand side of the table are characterised by an extremely weak rule of law enforcement and a lacking monopoly on the use of force. As a government's disability to enforce the law extends to the regulation of non-state justice institutions, we can assume that these act mostly autonomously (see chapter 4.1 and Table 3). Only regulations that contain neither behavioural rules that differ from effective informal conventions, nor procedural limits for the justice forum may be effective at all. For instance, the Pakistani Frontier Crime Regulation does not impose any particular obligation on the members of the Pakistani tribal areas. On the other hand, in the case of the South Sudanese Local Government Act of 2009, very elaborate regulation was passed that provides detailed prescriptions regarding customary court organisation and – like in South Africa – obliges the traditional authorities to adjudicate in accordance with the constitution.

Considering the strength of statehood in South Sudan today, the effective implementation of these regulations is rather unlikely. Even though the effectiveness of legislature on non-state justice institutions is not an issue that shall be discussed in this paper, the following two remarks should be made: The prescriptions for court organisation as laid out in the Chiefs Court Ordinance of 1931 have meanwhile very much formed the traditional system and are suppos-

edly complied with by the customary courts. The system constructed by the state legislature, even if it is not complied with properly, may still be an example for the informal institutions and serve as a normative bridge between the highly approved and well-functioning non-state institutions and the newly established state judiciary. The emphasis is on integrating the state judiciary into the traditional court system rather than vice versa (Diehl/Malz/Ruben 2013). But the success of a particular regulation depends not only on state performance, but also on the regulatory motive and the design of the respective regulation (see chapter 4.).

Case 6 – Customary Courts in South Sudan. The 2012 Constitution of the Republic of South Sudan explicitly recognises customary courts formed by local traditional authorities, particularly tribal chiefs. To be a chief is not to hold political power, but rather to have custody of tradition and peace. Still, the chief is part of the local "traditional authority". To run the court is one of his key functions. The chief can be addressed for conflict resolution by anyone at any time. The constitution provides that the courts shall apply customary law in accordance with the constitution and the laws concerning local matters like marriage, land, local quarrels, and even criminal offenses. The Local Government Act of 2009 in Art. 98 provides that the "Customary Law Courts shall have judicial competence to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities." The Act further provides detailed organisational rules for customary courts e.g. a system of classifications of different levels of courts, details of jurisdiction and appeals, and a set of trial principles. The Act is almost identical to the Chiefs Courts Ordinance introduced by the British in 1931. The chief courts administer the customary law (1) prevailing within the local limits of their jurisdiction and (2) when it is not contrary to justice, morality or public order.

Between extremely weak states and strong states we can find various states with a medium strength of statehood: (1) countries with a relevant internal variation of statehood strength, for example Afghanistan – sometimes referred to as "Kabulistan" – where statehood is much stronger in the capital than in some of the peripheries, and (2) countries where the ability to enforce the law is generally low across all areas and which lack state infrastructure in the field of justice and law enforcement. In Ethiopia, for example, multiple non-state institutions exist. Assefa (2011) counted up to thirty different non-state institutions in the region of Tigray alone. Several of these have been officially recognised by various legal regulations; some of them, like the kebele social courts, even to a great extent. In contrast, in the case of the Ethiopian Sharia courts, their strict obligation to the Civil Procedure Code is prescribed but cannot be enforced or controlled since the Sharia courts are not accountable to any other level of the state judiciary.

South Africa's constitution reflects the idea of a strong state with a strong affiliation to the rule of law, including the necessary capacity for law enforcement. Yet, according to various indices, the average ability of the South African state to enforce the law is rather low. Areas with a strong common law tradition and with strong state courts, especially in the cities, are juxtaposed with vast parts of the country, mostly rural, that are more or less cut off from state judicial institutions. As mentioned previously, these areas are characterised by a significant lack of judicial capacity, i.e. the state cannot provide the number of courts required to resolve all the conflicts

and to guarantee the general order. Customary courts stand in and take over the functions of official institutions in conflict resolution.

For the same functions, in Bolivia customary courts have found official recognition in the new constitution only recently.

Case 7 – Local Customary Courts in Bolivia. The Bolivian constitution of 2009 creates a "plurinational and communal law-based- and social-welfare-state" and gives official recognition to various traditional non-state institutions. Besides the extensive practice of settling conflicts within the family and among relatives, the more formal and most common way of traditional conflict-resolution draws on the participation of community authorities. Sometimes traditional conflict-resolution may also lead to an assembly of the entire community. The peasant communities have always maintained their customary law and courts with a jurisdiction encompassing all community affairs, but they are mainly concerned with public issues like conflicts over land. The procedure applied by customary courts is highly formalised and every case is strictly recorded. Its objective is to rehabilitate and reintegrate the accused. Sanctions are moral, material, and monetary and compliance with decisions is supposedly high. The customary courts avoid intervening in private conflicts within families, even in cases of divorce or abuse, and they do not take up severe crimes like robbery or homicide. Instead legal action would have to be taken at a state court – which often does not exist. The courts are bound to the constitution and have to consider human rights. However, their decisions are final, and no appeal to the state judiciary is provided. The only link to the state justice system is the Plurinational Constitutional Tribunal on the constitutional level.

The strong statehood performers on the righthand side of the scale are characterised by a high capacity to enforce the law, other government regulations, and to hold a monopoly on the use of force. Here, legal regulations concerning jurisdiction, organisation, procedure, and decision-making of non-state courts can be effectively enforced by means of state force. In this context, non-state justice institutions do not exist autonomously, because the state authorities can interdict and abolish them at any time. In fact, in the context of "consolidated statehood" with a functioning legal order and enforcement institutions, it seems rather peculiar to maintain autonomous legal systems at all, since they may deviate from state law and, thus, contest the normative consistency of the formal legal order (Koetter/Kuehl/Mengesha 2009: 13). One would expect that in order to avoid normative conflicts, strong states would try to keep their legal order free of non-state justice institutions and tolerate them only in compliance with the official law. Nevertheless, non-state justice institutions have always been tolerated to a certain degree for various reasons (see chapter 4.2.)

Self-regulation and self-governance can be granted on the base of personal or territorial jurisdiction. In the case of the religious communities in Germany, personal jurisdiction relates to specific issues of group members. In the case of customary law in South Africa it is applicable to the local legal issues of members of the African communities. In contrast, in the case of the jirga in the Pakistani tribal areas jurisdiction covers all legal issues territorially related to the

FATA. Similarly, in the case of legal authority for self-regulation by Native American tribes in the United States, the criterion is territorial. It covers far-reaching self-governance and self-regulation autonomy rights related to Indian territory.

Case 8 – Jurisdiction of the Native American tribal courts in the United States. In the USA, the Native American tribes' right to make law and adjudicate it is derived from tribal sovereignty and strictly bound to Native American territory (Levy 2000: 306). The jurisdiction of the tribal courts comprises family matters and civil claims as well as the conviction of criminal offenders. Tribal sovereignty is not unlimited, but subordinate to the sovereignty of the federal state. The "trust relationship" between the native tribes and the Federal State confers the power and the duty to regulate tribal affairs and to protect the tribes and their property against encroachment by the States and their citizens to the government (Canby 2009: 2). Congress regulates and modifies the status of the tribes, and the Supreme Court has jurisdiction over "Native American law" i.e. the body of law dealing with the status of the Native American tribes and their relationship to the federal government and over matters excluded from tribal jurisdiction. Since its emergence in the first half of the 19th century ("Cherokee cases") the Supreme Court has emphasised tribal sovereignty in a number of decisions. However, tribal sovereignty has been restricted by judicature and legislature in two respects: criminal jurisdiction in serious issues of crime and punishment (General Crimes Act of 1817 and Major Crimes Act of 1885), and the jurisdiction for civil cases affecting non-members (Canby 2009: 168). Territorial autonomy has been approximated to a personal autonomy model.

This chapter has shown that non-state justice institutions exist and are recognised under any degree of statehood strength. If the right of self-regulation is personal or territorial does not seem to depend on the statehood strength. We can find personal jurisdiction in weak countries like South Sudan, in strong countries like South Africa, but also under the conditions of consolidated statehood in Germany. Territorial autonomy on the other hand can be found in Pakistan as well as in the United States. This leads to a more differentiated look at different models and especially the degree of incorporation and their regulatory motive.

4. Incorporating non-state justice institutions into the state law system

The regulation of the respective non-state justice institutions in Bolivia, Ethiopia, and South Africa came into being in the mid 1990s with South Sudan following only recently. In all of these cases the regulation dates back to the introduction of a new constitution. However, like the non-state institutions themselves, their regulation is not a new phenomenon, both in strong and in weak states. The South African Black Administration Act, for example, was introduced in 1927 and is still valid in parts of South Africa today. In Sudan, the Chief Court Ordinance was valid from 1931 until recently, and it served as a model for the 2009 legislation on the customary courts. The formalisation of Ethiopian Social Courts dates back to the 1980s. The Bolivian customary courts, like the Ethiopian Sharia courts, were generally tolerated for a long time before their official recognition. The debates about Native American Law and the legal authority of the Native American tribal courts go as far back as the first half of the 19th century. In Pakistan, the

Frontier Crimes Regulation Act that regulates the status of the FATA was passed in 1901. The regulations regarding non-state justice institutions show a distinct variety of different models.

4.1 Legislative model of incorporation

Many publications on non-state justice institutions focus on one non-state system and the way it is recognised by the official judicial system of the country in which it exists. Comparative studies on different types of non-state justice institutions and models of their incorporation into the state legal order have only been produced very sporadically. The following discussion presents two of such approaches by Jacob T. Levy and Brynna Connolly. Levy's modes-oriented approach and Conolly's structural analysis have both delivered valuable insight into the regulation of non-state justice and the interface of state and non-state normative orders.[7]

4.1.1 Modes of incorporating indigenous law

In his essay "Three Modes of Incorporating Indigenous Law" of 2000 Levy distinguishes three legal ways to acknowledge non-state laws within the official legal order: (1) incorporation as common law, (2) incorporation as customary law, and (3) self-government. With reference to a number of illustrative examples he discusses their differences, virtues, and detriments.

(1) The incorporation of indigenous laws into common law "recognises customary ways of using powers or establishing legal situations for which the dominant culture has a different set of procedures" (Levy 2000: 302). In this mode, the common law recognises customary marriage or customary property conveyance not as acts or statuses of customary law, but rather as social situations that form acts and statuses of the common law. A customary marriage for example will be considered a legally relevant fact, bringing with it all the benefits and duties the state has attached to the act and status of marriage in common law. Common law incorporation grants general rights to indigenous people and makes them enforceable; however, it cannot take account of cultural particularities. Special rights that may be granted by customary law, but not by state law, for example polygamous marriage will not find recognition, because the "common law logic has no space for exemptions from general regulations" (Levy 2000: 303).

(2) When indigenous law is incorporated as customary law, its status as a separate and not completely subordinate system of laws is confirmed. In customary incorporation, the state recognises a body of laws that is based on customary rules and usages of the indigenous community without conceding sovereignty to that community (Levy 2000: 300). In this model, indigenous people have the right to be governed by their own traditional law and they can uphold or establish institutions to maintain their legal culture. However, the sovereign state in this case can set the limitations to the self-regulation autonomy of the indigenous people and it can always

7 See similar works by Manfred O. Hinz' (2008) who diffentiates five different positions of African tradition in a given society whose focus is laid on a more abstract cultural level and on the legal level resembles Connolly's typology, and by Myranda Forsyth (2007) who differentiates types of incorporation similar to Connolly's.

"claim the right to override customary law by explicit legislation" (Levy 2000: 300). Indigenous law can be incorporated as customary law by the state courts or by indigenous courts; in most cases, both will be true to some degree. The state law can provide detailed prescriptions for the application of customary law by the courts, like in South Sudan or in South Africa, where the customary laws have to be applied subject to the constitution and especially the bill of rights. Since customary law affiliation is personal and not territorial, the state law can provide a right to choose under which law residents live and settle their disputes, even on an issue-to-issue basis (Levy 2000: 322). Customary law incorporation can provide far-reaching cultural autonomy to indigenous people, but depending on statutory regulation it can also be rather limited.

(3) The self-government model grants territorial sovereignty. In this model, indigenous peoples are, at least in principle, considered relatively sovereign states or nations, and their law is respected in a way analogous to the respect accorded to the laws of foreign states (Levy 2000: 305/306). According to Levy (2000: 306), it is "the only mode to recognise a lawmaker in addition to, or instead of, laws." Therefore, self-government leaves the least space for democratic and rule-of-law concerns, as well as for liberal human rights constraints (Levy 2000: 323). As long as self-government is still thought of as a model of incorporation and does not imply secession, however, at least some rudimentary connections with the state system and the state legal order have to be preserved. These connections can produce intense restrictions to the degree of autonomy within self-government, as for example the self-regulation by the Native American tribes in the United States with its limitations concerning serious crimes and non-members shows. In this respect tribal sovereignty remains subordinate to the federal level. The trust responsibility obliges the federal government to protect tribal rights, but it also authorises the federal organs to regulate tribal affairs and thus restricts tribal self-regulation autonomy.

Levy's description of these three models of incorporation serves his purpose of discussing the coexistence and intercoupling of state and indigenous legal orders, especially in respect of the granting of rights. Levy argues from the perspective of the state that responds to the existence of indigenous legal systems and indigenous communities' request for the recognition of their existence and their rights. He asks "how best to balance goals like respect for indigenous traditions, protection of the rights of indigenous persons, legal clarity and simplicity, and peaceful and co-operative coexistence with the wider society." (Levy 2000: 297) He argues that "the fact that one model accords greater status to indigenous law than another does not necessarily mean that indigenous people have more or preferable rights under that model." (Levy 2000: 298) Rather, a closer look must be taken at how the model is formed in specific circumstances and what kinds of competence and restrictions it provides.

Levy neither asks about the functionality and legitimacy of the incorporation, nor about the benefit of a specific state regulation that may serve as collision regime to intercouple two forms of normativity and avoid normative conflicts. He also does not ask about the functional conditions of the incorporation, for example with respect to the general condition of the law and the state's ability to enforce it. Further, he does not examine to what extent the non-enforcement of state laws that nominally restrict the non-state justice institutions may result in an increase

of their autonomy. Levy, in the end, creates his schema of models of incorporation, in large part based on the extent of status and/or the degree of autonomy they grant to indigenous law. He assumes a low degree of autonomy in common law incorporation, where the indigenous peoples are treated equally like everyone else and no special rights apply. He sees the largest degree for autonomy in the model of self-governance and positions the customary law incorporation, with its multiple linkages between the state law and the non-state system, somewhere in between.

4.1.2 Recognition typology

In her "Proposal for a Recognition Typology" of 2005 Connolly analyses legislative acts and distinguishes various types of regulations of non-state justice institutions in order to categorise some of the potential postures of the state toward the non-state institutions and to consider some of the consequences. For this purpose, she examines a large number of example cases of weak justice systems from various countries, focusing on the state regulation of non-state systems. As expressions of different approaches of states toward non-state justice institutions, she distinguishes and evaluates four different types of recognition regimes that incorporate the non-state justice institutions into the state legal system in different ways (Connolly 2005: 247). These ways are (1) abolition as a form of negative recognition, (2) complete and (3) limited incorporation , and (4) no incorporation as form of unbound co-existence.

(1) In the model of abolition – also labelled "recognition by exclusion" – the state recognises the non-state justice institution only by legislation or court judgment that explicitly delimits broad areas in which the non-state norms may not be applied any longer, or expressly prohibits the institution in its entirety (Connolly 2005: 249). The two main rationales underlying this approach are, first, "the perceived need for legal or political unity" and, second, the perception that non-state institutions are "uncivilised" or "primitive." Connolly names three major arguments against abolition (2005: 259). First, abolition negates the positive effects of non-state institutions as sources of legitimacy and efficiency for conflict-resolution and public order. This phenomenon seems to be particularly destructive when western justice systems are imposed on communities using non-state justice institutions. Second, Connolly points out the moral and ethical concerns, particularly with respect to indigenous peoples that pre-existed western-style judiciaries. Their pre-existence maintains a strong argument for their right to self-government. Third, the fact that non-state institutions have a long tradition of being passed down from generation to generation make it highly unlikely that a state justice system will be capable of completely and effectively replacing or abolishing them. And finally, Connolly points out that the model of abolition might overlap with the model of complete incorporation, in which a non-state institution loses its informal status by means of juridification.

(2) In the model of complete incorporation, the non-state institution is legally formalised by juridification and becomes an institution of the state legal system. The formal state court system may recognise and apply non-state norms like state laws in its decision-making. With reference to Levy, Connolly points out that "non-state legal norms may thus be recognised as a matter of

fact with the formal state court taking judicial notice of those norms in the relevant case, or as a matter of law, with the state court applying non-state norms as rules of decision"(2005: 261). The state law system may formalise a non-state norm by legislative act and thus incorporate it into the body of the official state law, and it may also establish formal courts that adopt the functions formerly fulfilled by non-state courts. In all of these variations, norms of non-state origin become relevant in the context of the formal state judicial system. Complete incorporation links the non-state system to the state legal order and allows not only for limitation and control, but also for official legitimisation of the non-state system, stages of appeal, and for public enforcement. At the same time, the non-state institution loses its informality and its character as a "homegrown" institution through public appropriation. The further development of customary law by the general courts severs the relation with the traditional sources of knowledge and an artificial official customary law emerges.

(3) The model of limited incorporation "allows the informal mechanism to exist independently of the formal state structures while embedding them in low-surveillance and accountability mechanisms"– e.g., by a process of appeal – and "allowing for cross referrals." (Connolly 2005: 248) In this model, the systems "may retain distinct jurisdictions, perhaps most commonly with the formal state courts retaining general jurisdiction while the [non-state institution] retains limited jurisdiction over cases arising in specific areas relating to the communities in which the [non-state institution] is active" (Connolly 2005: 247). This model was the basis for many of the colonial legal systems in Africa, where family law, land law, and chieftaincy were ordered according to customary law. Pluralism was one way to block and control by dividing and conquering. Thus, self-regulation served as a key element of indirect rule. Recognition was accorded to tribal customs subject to the provision that the custom itself would not be repugnant to certain "widely applicable standards," which of course related to values of western culture (Connolly 2005: 276). Limited incorporation forms a dualistic court system that allows for appeal to a state court for a final decision. This, combined with the fact that customary courts have to be officially authorised by the state, clearly shows the hierarchy in the two strands of the judiciary. Today, limited incorporation still remains the leading model for new regulations regarding the connection of the state law system and non-state laws.

(4) In Connolly`s model of no incorporation "informal courts coexist with the formal state system but without incorporation of the former structures into the latter." (2005: 248) Connolly distinguishes between two variations of this model. The first "effectively grants self-government rights among minority groups, as with Native American tribes in the United States." Here, "the group retains the right to determine their own status, and interpret, apply, and change their own laws" within an autonomous, self-governed territory. The second model "creates completely distinct legal systems within the state, with virtually no interrelation between the systems" (2005: 290). Connolly points out that from a moral and ethical point of view, no incorporation may be the most appropriate ,or even the only acceptable model for indigenous groups within western societies like the United States or Canada. However, as non-state systems generally raise questions of bias, particularly toward less powerful segments of the society, the devolution of sovereignty may have to be restricted and bound to certain conditions.

Like Levy, Connolly focuses only on the regulatory side of the incorporation of non-state institutions. Apart from offering different models or types of incorporation, her regulation-oriented approach examines the recurring issues in terms of content and systematics of these regulations, for example, the assignment and limitation of jurisdiction, rules of procedure, and the applicable standards of decision-making. Connolly further names the benefits and the inconsistencies that can arise from different types of incorporation. She reflects on the problem of normative collisions and on the potential of granting the right to switch jurisdictions in the case of appeal.

A closer look reveals that Connolly's sophisticated distinction of four different types of incorporation is only of limited usefulness. As she points out herself there are no empirical cases for the two borderline types of complete abolition and unlimited recognition of the sovereign non-state legal system. Consequently, all her empirical cases illustrate forms of incorporation with various degrees of autonomy and recognition. The case of the North American tribes illustrates this well, where tribal sovereignty can be claimed only in relation to the United States, and not on a federal level. The "trust relationship" between the federal state and the tribes indicates a type of limited incorporation. "No incorporation" in the sense of Connolly's typology would be characterised by a total regulatory abstinence, but as she argues herself, this is a purely hypothetical case (Connolly 2005: 292). On the other hand, the distinction between complete and limited incorporation leads to unresolvable difficulties. The South African constitution, for example, extended the formal legal order to the traditional system and in so doing "completely incorporates" it. However, the institutions still rely on the traditional sources of legitimacy, and the jurisdiction of the courts is attributed on a personal basis, which in Connolly's typology characterises "limited incorporation". Essentially, all of Connolly's cases lie somewhere in between complete autonomy and complete integration of the non-state system and therefore are variations of her "limited incorporation" type.

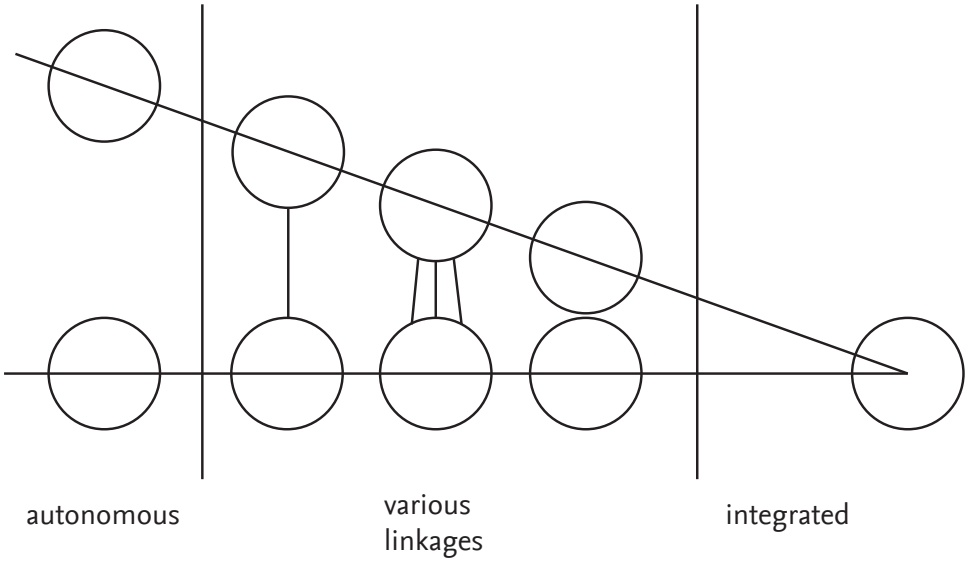
4.1.3 Degrees of autonomy and recognition

Regulations of non-state justice systems differ in respect of the degree of autonomy they grant the non-state legal system and in respect to the specific mode of recognition. Whereas the latter relates mainly to the procedural and substantive specifications and mechanisms of accountability and control (see chapter 5.) the degree of autonomy refers to the relationship between the non-state system, and the state law and judiciary. Instead of distinguishing fixed types of incorporation, it seems more adequate to use a scale where cases can be set along a flexible criterion. Relating to Levy's threefold model of integration (common law), parallel orders (customary law), and relative autonomy (self-government), as shown in table 2, the criterion will be the increasing or decreasing autonomy of the non-state justice system in its relation to the state legal system and the state judiciary. This results in degrees of autonomy and recognition characterised by the specific linkages between the systems as shown in table 2.1.

Since the empirical cases will always preserve at least a minimal amount of independence and connectivity, they will be set in between Connolly's hypothetical borderline cases of complete

autonomy and complete integration that mark both ends of the scale. Autonomy can be granted on a territorial base, or issue-related for a particular group of people. The respective degree of autonomy relies on the extent of recognised self-regulation and the effect of the various linkages that connect the two systems.

Table 2.1: Varying degrees of autonomy

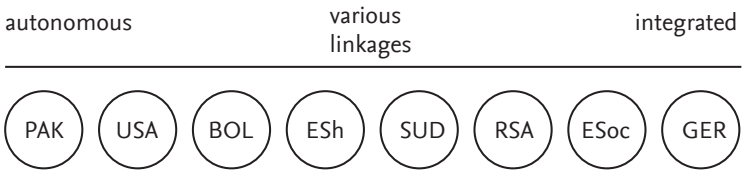


Coming back to the eight cases of non-state justice institutions analysed for this paper, we can attribute these to the scale of varying degrees of autonomy. The Pakistani FATA and the US Native American tribes cases, as examples for territorially based autonomous self-regulation, are characterised by the least intense linkages between the legal systems and, thus, can be considered the closest to autonomy. The FATA are in fact even more autonomous since the federal courts do not claim jurisdiction over them. With its limitations, the US system is closer to the recognition-as-customary-law cases in Ethiopia, Bolivia and South Africa. Their positioning relates to the intensity of the regulation and the linkages with the state legal system. Whereas in the cases of Customary Courts in Bolivia and Sharia Courts in Ethiopia only weak linkages are prescribed, the customary courts in South Sudan and South Africa are bound to the constitution in similar ways, and the jurisdictions are interconnected. Ethiopian Social Courts, however, are tightly regulated and integrated into the general official organisation of the judiciary. This comes closest to the highly limited jurisdiction of religious groups in Germany, the case that can be considered an example of the highest degree of integration. The illustration in Table 3 shows these considerations, though it is of course only a very unspecific approach to such schematisation. A contestable positioning of the cases on the scale would require a much more sophisticated operationalisation of the cases and their specifics (for details see chapter 5.).

In the table the Pakistani FATA and the self-regulation of the North American tribes in the USA show the greatest autonomy. Territorially based autonomy rights with respect to the more holistic approach exceeds regulations that only grant personally or group related self regulation of certain issues. FATA is farthest to the left due to the high degree of territorial autonomy, as the

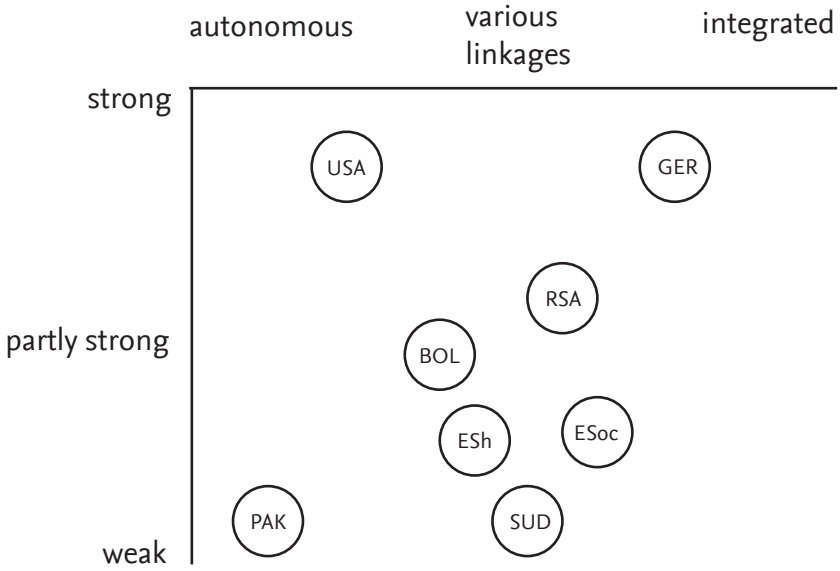
local communities are largely undisturbed by any federal intervention. In the US case, however, territorial autonomy is partly restricted with respect to jurisdiction over non-members; tribal sovereignty is still subordinate to federal sovereignty. The cases in between differ in respect to the specific degree of autonomy the non-state system enjoys: the Bolivian customary courts with very low state influence and no appeal option; the Ethiopian Sharia courts with only procedural prescription; the South Sudanese and South African customary courts with autonomy in terms of procedure, but still strictly bound to the respective constitutions; and then the Ethiopian social courts as part of the state court system, which have an autonomous right to choose the procedure and standard of decision-making. At the other end of the scale, closest to integration, is the case of the German religious communities which are well incorporated into the state justice system.

Table 2.2: Varying degrees of autonomy – cases[8]



The distribution of the cases and especially the proximity of the US case to the FATA case on the scale already suggests that the degree of state performance and ability of law enforcement may not be the crucial factor for states in their choice of incorporation model and the degree of autonomy they are willing to grant non-state systems. The following table (Table 3) combines the two scales in one diagram.

Table 3: State strength and degrees of autonomy



8 The eight cases are: Pakistani FATA (PAK), Indian Tribal Jurisdiction (USA), Bolivian Customary Courts (BOL), Sharia Courts in Ethiopia (ESh), Customary Courts in South Sudan (SUD) and South Africa (RSA), Social Courts in Ethiopia (ESoc), and Religious Jurisdiction in Germany (GER).

The table shows no linear relation between the degree of statehood and the choice of regulatory model. We can find a case with a high degree of autonomy in a strong state (American Native American tribes) and one in a weak state (Pakistani FATA). We can further see a high degree of integration in a strong state (German religious communities) and a similar regulation in a relatively weak state (Ethiopian social courts). As mentioned before, we can assume a regulation with detailed prescriptions will not function properly in a weak state with low law enforcement ability, irrespective of which regulation model is used. Still, the case of the South Sudanese customary courts and the procedural bindings in the case of the Ethiopian Sharia courts show very detailed prescriptions. The effectiveness of such regulation would have to be assessed on an empirical base. The reference parameter of such an assessment would be the objective pursued when incorporating the non-state institution into then state legal system.

4.2 Regulatory motives

We assume that regulations are set by the state institutions to serve a specific purpose. This intention specifies how the system is supposed to function properly. The "regulatory motive" can serve as the yardstick for the evaluation of its success. Even if legislation, as well as other state regulations, are usually based on a multiplicity of motives, we can distinguish some main regulatory motives. In this respect Donna Lee Van Cott presents three reasons for the increased confirmation and formal recognition of non-state institutions in the 1990s in her essay on "Dispensing Justice at the Margins of Formality" (2006: 264/66):

(1) Cultural Rights Protection: the first reason Van Cott names is the recognition and protection of collective rights of cultural and religious groups. The state responds to internal pressure built up by indigenous organisations to recognise their collective rights as peoples and their cultural laws, which are seen as an integral part of the demand for self-determination.

(2) International Obligations: as a second reason she names the fulfilment of international obligations for the treatment of such groups. The Convention 169 of the International Labour Organisation (ILO) is an example of such an obligation. It requires that states allow indigenous communities to preserve their legal customs and institutions and that states adjust their national legislation to apply the norms of the convention. The state is bound in relation to the national community and thus provides an argument for internal pressure groups.

(3) Extension of state authority: the third reason Van Cott names for the recognition of indigenous laws by a state is the extension of the presence of state public law and authority throughout the territories, particularly in rural areas, and in respect to all groups of the population and even their internal affairs. By linking existing, effective, authoritative, and highly legitimate informal justice institutions to the formal law, states intend to indirectly increase the effectiveness, authority, and legitimacy of their justice system.

As to the recognition of the eight non-state justice systems described in this paper all three motives are relevant. Motive 1, the protection of cultural rights of minorities is mentioned as the

motive to recognise non-state justice institutions in more or less all of the cases. It is the main argument in German constitutional law argumentation regarding the self-regulation of religious communities. It also justifies the territorial sovereignty of the Native American tribes and the trust responsibility of the federal government as one core element of US Native American law. It is also the main argument in South African diversity and human rights debates where diversity was completely suppressed under the Apartheid and is seen as a major political achievement today. Motive 2, the fulfilment of international obligations, is explicitly mentioned only in the case of the Bolivian Customary Courts (Ossio 2013). Finally, motive 3, the extension of state authority, the validity of public law and the capacity for ordering, is mentioned as one main reason in the case of the FATA, but also in the literature on South Sudan, South Africa, and Bolivia.

None of the three motives, however, covers the fact that in the more recent cases the intention was mainly to formalise and especially juridify non-state governance in order to structurally approximate it to the state law system and lay the foundation for the intercoupling of non-state and state institutions. The rule of law shall be ensured as a pre-condition of human rights protection. This relates to the rule of law debates we sketched out in the first chapter of this paper. It aims to provide access to justice and therefore to avoid, for one, the arbitrary exertion of the exceptional powers non-state judges possess, especially if they are in a position of traditional authority. Secondly, it aims to avoid cruel punishment and arbitrary damnations executed in the name of custom and tradition (Weeks 2011a: 3). Regulations are meant to ensure the compatibility of acts and decisions of non-state institutions with what in colonial times was repugnantly called "widely applicable standards". Meanwhile, the formalisation or juridification of non-state institutions makes these institutions compatible with a minimal standard of human rights protection and due process. Furthermore, by building adequate structures to supervise or control the institution, their obedience to general constitutional values is ensured. State law, in this respect, is considered a legal common basis for the existing normative orders and a framework to manage the problems that result from legal pluralism. It therefore seems necessary to add a fourth regulatory motive:

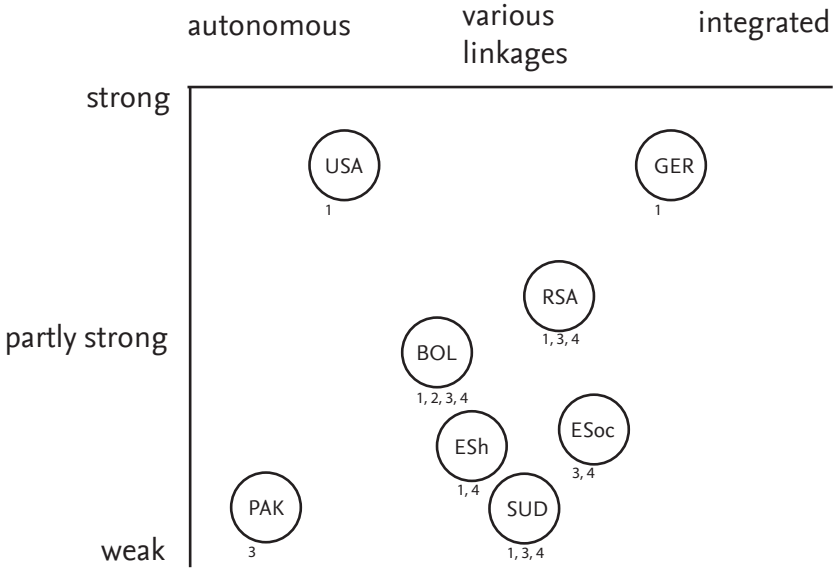
(4) Juridification/rule of law: A fourth reason relates to rule of law functions, especially improving access to justice and due process. State regulation goes back to the realisation that obligatory constitutional requirements will not be met without a closer binding and judicial monitoring.

In table 4 the four regulatory motives are added to the eight cases. It suggests that the motive may not be the relevant reason for the choice of the respective model of incorporation.

There appears to be a relation between the regulatory motive and the degree of state performance in the respective country. Unsurprisingly, strong states seem to recognise non-state justice institutions primarily in order to protect cultural rights, whereas in weak states the extension of authority and the rule of law take precedence. In the consolidated states of the north,

the idea of extending state capacity is not of particular importance. Here, the non-state justice systems have the function of providing adequate space for self-regulation to distinct cultural and religious groups within society, as well as granting them cultural rights – which in fact corresponds with motive 1. Non-state justice institutions in strong states are thus embedded into the state legal order and strictly framed by its provisions. Motive 2 appears to have only a complementary argumentative function. This seems true, for example, in the case of Bolivia, where the fulfilment of international obligations from ILO convention 169 was explicitly mentioned as one major reason for the official recognition of the customary court, but the recognition itself was primarily based on the government initiative in the new constitution of 2009. In states with a very low ability to enforce the law and poor justice institutions, however, the non-state systems are likely to function as substitutes for state institutions, and governments are generally eager to share their legitimacy and power to ensure the general order (motive 3). The cases of the FATA and the reasons given for the recognition of customary courts in South Sudan are examples of this motive.

Table 4: Model of incorporation and regulatory motive[9]



Forming mechanisms to ensure rule of law functions (motive 4) is mentioned as the main reason for the juridification of non-state justice institutions in a number of recent cases. The respective cases are characterised by a weak to partly strong statehood performance. The primary strategy seems to be gaining control over the non-state system by incorporating it into the state legal order and judiciary. This is often based on the expectation that the non-state system, whose legitimacy rests on sources independent of the state, may contribute to an increased legitimacy of the regular judiciary. The case of customary courts in South Sudan or the Ethiopian social courts are an example of this. Sometimes recognition by the state may even

9 1 = Cultural Rights Protection, 2 = International Obligations, 3 = Extension of State Authority, and 4 = Juridification/rule of law.

increase the legitimacy of the non-state institution and, thus, improve its potential to provide order and stability. On the flip side, this recognition has the potential to lead to a perpetuation of constitutionally precarious conditions if a consolidation of arbitrary exertions of power occurs (Weeks 2011a/b).

An evaluation of the regulations of non-state justice institutions would have to start by taking these motives into account. In this respect, a self-government regime facilitated to protect cultural rights would be successful if the delimitation of the state and non-state systems succeeded and allowed for self-regulation in a manner that was supportive of the culture of the group. If it were facilitated solely to ensure that order and security be provided by the non-state system, however, its success would have to be evaluated taking this objective into account. Furthermore, if self-government was intended to intertwine two or more legal orders and to create common normative grounds, its success would have to be evaluated under several aspects. For one, its success would have to be based on the degree of self-regulation. Furthermore, the success of a regime of self-government would depend on the avoidance of detrimental legal effects that may derive form normative collisions as a consequence of normative plurality. In South Africa, one of the main objectives is the appropriation of supplementary capacity for conflict resolution to provide better access to justice. This implies the practical concerns of better accessibility and cultural adequacy, but also the exercise of court hearings and the delivery of decisions subject to the constitution, i.e., due process and the respect for human rights.

Where state ability to enforce the law is low, obedience to and enforcement of state law regulations can hardly be expected. In how far this may still result in the legitimising effects mentioned above is a question that requires further empirical research before being answered.[10] For now, in a final step, we want to turn to the design of regulations of non-state justice institutions and discuss two kinds of regulations used to link non-state institutions and state law .

5. Design of regulations

The design of regulations of non-state justice institutions in various legal systems show a number of typical regulatory issues that determine the conditions and limitations of recognisable decisions made by the non-state institutions. These issues include rules about the status and relevance of the non-state system from a state legal point of view, organisational requirements, attribution and limitation of jurisdiction, and principles and rules the non-state institutions have to acknowledge in their decisions. Two main kinds of regulations used to link non-state institutions and state law can be distinguished and shall be discussed very briefly here. These are, first, specific prescriptions with regard to procedure and substantial standards that have to be obeyed by non-state institutions and, second, organisational rules in which non-state institutions are embedded and which can provide procedural alternatives and remedies.

10 Even though the South African customary courts have been the subject of intense research for years, no empirical database exists that can show their effect on the access to justice and on the proliferation of constitutional values in rural communities.

5.1 Prescriptions

Prescriptive rules concerning the status, procedure, and the decision of the non-state justice institutions can be assigned to four different categories:

(1) Formal Rules of Recognition: these are provisions like the Minister of Justice's authorisation of a chief to run a customary court in South Africa according to Sec. 12 and 20 of the Black Administration Act. Another example is of judges in the federal Sharia court in Ethiopia being appointed by the federal Judicial Administration Commission upon the recommendation of the Supreme Council of Islamic Affairs, as accorded in Art. 17 of the Federal Courts of Sharia Consolidation Proclamation of 1999.

(2) Jurisdiction: rules on the recognition of the territorial, material, and personal jurisdiction of non-state institutions and also on their limitation. An example of this is Sec. 12 and 20 of the Black Administration Act, according to which South African customary courts have jurisdiction in civil and criminal conflicts between members of the African community. Similarly, the US Major Crimes Act restricts criminal jurisdiction of tribal courts in cases of capital crimes.

(3) Procedure: rules on procedure that non-state institutions are obliged to adhere to. An example of this is the obligation to keep records of hearings in South African constitutional courts, or, even more comprehensively, the obligation for Ethiopian Sharia courts to apply the general Civil Procedure Code and other relevant procedural state rules in their proceedings according to Art. 6 (2) of the Federal Courts of Sharia Consolidation Proclamation.

(4) Substantial rules and principles: substantial legal rules which non-state institutions do not necessarily have to apply explicitly, but which their decisions have to comply with. An example of this is in Sec. 211 (3) of the South African Constitution, according to which the "courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." Another example can be found in Sec. 166 of the Transitional Constitution of the Republic of South Sudan of 2011 according to which a "traditional Authority shall function in accordance with this Constitution, the state constitutions and the law" and "the courts shall apply customary law subject to this Constitution and the law."

Since these legal prescriptions may interfere with the normative system applied by the non-state institution and therefore may not be complied with, they require some sort of institutional security. In any case, if the law enforcement ability is low, the pursued regulatory objective will hardly be achieved.

5.2 Organisational embedding

The non-state justice institution and the state judicial system can be intertwined in different ways. The most common mechanism is to provide stages of appeal that allow for an alteration of the path of legal action originally taken. In most of our cases, the litigants of a non-state court

proceeding have the right to appeal to a state court. Systematically speaking, the non-state institution can be considered a court of first instance then, whereas the state court would serve as an appellate body in the second instance. However, the jurisdiction and competence of the appellate court may differ relevantly. The prescribed standard of decision-making may also vary. Three ways to alter the path of legal action can be distinguished:

(1) Choice of jurisdiction: the litigants have the right to decide freely whether they want to take action at the non-state justice institution or at a general court. In this variant, none of the jurisdictions are exclusive and "forum shopping" is allowed. The legal standard may, however, remain the same in all the different possible courts with jurisdiction, like, e.g., in South Africa where the courts must apply customary law whenever that law is applicable, no matter which court decides (Sec. 211 (3) of the Constitution).

(2) Crossing of jurisdictions: quite often, state law allows for the crossing of jurisdictions, however, only in one direction: the parties of a non-state court proceeding are granted the right to appeal to a state court. We have not heard of a single case that provides an appellate proceeding at a non-state justice institution after a state court has already made a decision. In South Africa, after the final decision of the customary courts, the litigant may appeal to a magistrates' court. Again, this does not necessarily imply a change of legal standard, as the South African example shows – here, the appellate court also has to decide with account to the applicable customary law.

(3) Change of legal standard: In some cases, however, the alteration of the justice system may be affected by the change of legal standard, for example in the case of appeal following a decision of an Ethiopian Social Court. The respective proclamation in the Amhara region provides that the municipal court responsible for the appellate decision has to apply state laws, no matter what the standard of the decision at first instance was and no matter how far custom was considered.

The rules on the formal recognition of a non-state institution, as well as on the recognition of its territorial, material, and personal jurisdiction, serve as means for the organisational embedding. But while they regulate – i.e., assign and restrict – the scope of the decision-making power of the non-state institution from a state-centred perspective, the provisions on their organisational embedding focus on the connections of the two systems and their potential for mutual completion. The intercoupling of the different paths of legal action aims at achieving common normative grounds for decisions on the formal basis of the general validity of the law and, substantially, on the basis of the respective constitution and its rules and principles. Integrative decisions may be reached on the level of the highest-ranking courts, especially the constitutional courts, which respect and apply the non-state law's specific modes of functioning, and at the same time adhere to constitutional provisions and other state-law prescriptions.

The South African Constitutional court, for example, in the Shilubana v. Nwamitwa case (2009) held that the courts must recognise and give effect to developments within the community "to

the extent consistent with adequately upholding the protection of rights." In this case, the community had drastically modified the traditional institution of male succession in chieftaincy in order to allow the daughter of a deceased chief to succeed him. Drawing on the constitutional provisions on gender equality, the constitutional court overturned the decisions of the Supreme Court of Appeal that had upheld the petition of the daughter's cousin, who was the next male descendent in line (Rautenbach 2013). Some kind of back coupling has to occur between the high courts and the courts of lower rank in order to preserve the consistency of the law as a general normative framework. This applies not only to non-state court judges and traditional leaders. Both state and non-state judicial institutions have a lack of knowledge regarding the each other's laws and a lack of will to draw on each other's knowledge when necessary.

Customary courts will have to consider the provisions of the constitution in their decision-making, which they cannot as long as they make their decisions solely within the standards of customary law. To have a customary court decide in accordance with provisions of state law, a rule of customary law will have to emerge that is identical to the state law provision and, thus, avoids contradictory decisions. But since customary law only emerges by repeated social practice over a long period of time, for a provision of the constitution to become part of customary law, a modification of the social practice and the legal discourse of the community has to occur (Teubner 1991/92: 1457). This could for instance take place in reaction to decisions made by state court judges on the standard of the customary law, especially if contradictory decisions of customary courts already exist. At the same time, if customary court judges are to consider and apply state law and thus contribute to the proliferation of the state law in their legal context, it is necessary to accept that they will give different interpretations and will promote changes of state law provisions. It will be the function of appellate courts to smooth over the discrepancies in a way that allows mutual feedback.

Much more problematic than discrepancies and inconsistencies in the application of the law following the intercoupling of judiciaries, is the renouncement of such linkages between state and non-state judiciaries. Adjustment cannot be expected without institutional linkages. This is not very surprising considering extreme forms of self-governance and autonomy. For example, the Pakistani tribal areas would be a good case of a decoupling of normative systems, however, state capacity is far too poor to establish serious connections. But this problem also occurs in systems with multiple connections like in the case of the Ethiopian Sharia courts, where the connection to the state judiciary is irreversibly severed after both parties have explicitly agreed to take legal action at the Sharia court. The obligation to apply the general laws of procedure shall prevent a complete separation. But without any institutional security, e.g. the right of appeal to a state court, compliance with these rules will be difficult to control in a country with an extremely low law enforcement ability. In South Africa, the choice of jurisdiction and stages of appeal to the state judiciary have a long tradition, but have been strongly contested lately in connection with the revision of the respective legislation and the draft of a Traditional Courts Bill (Weeks 2011b; Rautenbach 2013). The representatives of traditional law argue for restricting the inherited and widely approved system of organisational embedding. This is due to their fear for legitimacy, should it be the case that the state courts could overrule their adjudications. In

this situation, more and more people would take legal action to the state courts instead of first addressing the traditional courts.

6. Conclusion

The recent attention paid to non-state justice institutions in the literature on comparative constitutional law, and law and development can be explained by the failure of institutional transfer in regard to the rule of law. It is accompanied by the conceptual concession that non-state institutions may serve rule-of-law functions. Non-state justice institutions do not only exist in states with a low ability to enforce the state law, where they may complement or even substitute the functions of the state legal system. We can also find them in strong states. Thus, the strength of a state, understood as the degree to which it can enforce the law, does not determine which model is chosen to incorporate non-state law into the state legal system. Models with varying autonomy of the non-state system (in relation to the state legal system) can be found in various conditions of a statehood: models such as extensive territorial autonomy, as well as highly integrated decision-making forums rooted in non-state mechanisms. However, we see a relationship between the degree of statehood performance and the pursued regulatory motive. While states with a high law enforcement ability emphasise the granting and protection of cultural and religious rights, weak states focus on the extension of state authority, which may be achieved by incorporating the non-state system into the official state judiciary.

A number of recent regulations also intend to increase rule-of-law standards in non-state institutions' practice, particularly due process and the protection of human rights. The juridification of these systems – their binding to constitutional provisions and their organisational linkage to the state judiciary – help achieve better access to justice, even in areas with low statehood performance. Under these conditions, it seems very unlikely that the practice of the non-state institutions will be changed by making formal laws that require compliance from non-state judges. Other institutional securities would be necessary here. Institutional arrangements like the right to choose the path of legal action or stages of appeal could bring solutions to this problem, depending on their specific design. For the evaluation of their effectiveness, more empirical data must be collected.

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Research Framework

Governance has become a central theme in social science research. The Collaborative Research Center (SFB) 700 *Governance in Areas of Limited Statehood* investigates governance in areas of limited statehood, i.e. developing countries, failing and failed states, as well as, in historical perspective, different types of colonies. How and under what conditions can governance deliver legitimate authority, security, and welfare, and what problems are likely to emerge? Operating since 2006 and financed by the German Research Foundation (DFG), the Research Center involves the Freie Universität Berlin, the University of Potsdam, the European University Institute, the Hertie School of Governance, the German Institute for International and Security Affairs (SWP), and the Social Science Research Center Berlin (WZB).

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